# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SPECIAL CIVIL APPLICATION No. 16988 of 2005

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE A.L.DAVE**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**DP SWAMI - Petitioner(s)**

**Versus**

**STATE OF GUJARAT & 4 - Respondent(s)**

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**Appearance :**

MR PARESH UPADHYAY for Petitioner(s) : 1,
MR LB DABHI Ld. AGP for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**

**Date : 25/10/2005**

**ORAL JUDGMENT**

1. Rule. Learned AGP Mr.Dabhi wavies service of notice of rule on behalf of respondents.

2. It is indicated that affidavit-in-reply is filed and

copies are served on learned Advocate for the petitioner. However, the same is not to be found in the docket of the Court. Learned AGP Mr.Dabhi furnishes to the Court a xerox copy of the affidavit-in-reply along with annexures to facilitate the hearing of the petition. Same is taken on record.

3. Since the hearing of matter on admission and interim relief would take almost the same time as final disposal of the petition, by consent of parties, the petition is finally heard and disposed of today itself by this judgment.

4. The petitioner, after passing MBBS examination in the year 1982, came to be appointed by the Government as Medical Officer (Class-II) in the Health and Family Welfare Department by order dated 30th June,1983 and he joined the service on 29th July,1983. The petitioner, in the year 1994, addressed a communication dated 21st November,1994 / 1st December,1994 to the appointing authority i.e. Additional Chief Secretary of the Health Department resigning from the post with effect from 31st December,1994. The said resignation was sent through proper channel i.e. Head of the Department. Since the appointment was by the Government, the decision on

resignation was required to be taken by the Government and the Head of the Department was supposed to forward the same to the Government with his comment. It appears that the said resignation was never forwarded to the Government. However, by telegram dated 12th December,1994, the petitioner came to be informed by Commissioner of Health that his resignation cannot be recommended. The said decision appears to have been taken on the ground that he was a bonded candidate. Upon this decision by the Head of the Department, the petitioner was directed to join his duties urgently.

4.1 It appears that the petitioner discontinued to work from 1st January,1995 till he was given a posting at Community Health Center, Harij, District – Mehsana by order dated 2nd November,1995 (Annexure-G) passed by Chief Personnel Officer, Health, Medical Services and Medical Education, Gandhinagar pursuant to an order passed by the Commissioner of Health on 18th October,1995. The petitioner resumed at Harij on 3rd November,1995.

4.2 The date of birth of the petitioner being 1st March,1945, he attained age of superannuation by end of March,2003 and came to be superannuated as such. Pursuant to his retirement, an order fixing and sanctioning his

pension came to be passed on 3rd June,2003 (Annexure-B) by Director of Pension and Provident Fund, Gandhinagar. However, he is yet to receive any amount by way of pension, gratuity and commuted pension. The case of the petitioner is that the order is not implemented because the Treasury Officer insists for No Event Certificate and No Due Certificate, which is supposed to be issued by the Head of the Department and despite repeated requests, the Head of the Department is not issuing those two certificates. He is, therefore, required to file this petition making following prayers:

> “7. The petitioner respectfully prays that on the basis of the facts and circumstances and ground as mentioned hereinabove and which may be urged at the time of hearing, the Honourable Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to the respondent authorities and may be pleased to :
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> (A) direct the respondent authorities to make payment of pension, gratuity and commutation of pension, flowing from the pension payment order dated 3.6.2003, Annexure-B to this petition, with interest for the delayed payment of these dues, at

the rate, which the Hononourable Court may consider as just and proper in the facts and circumstances of the case, and

(B) award the cost of the petition, and

(C) grant any other relief or pass any other order which the Honourable Court may consider as just and proper in the facts and circumstances of the case, and

(D) pending admission and final disposal of this petition the Honourable Court may be pleased to direct the respondent authorities to start paying monthly pension as per the pension payment order dated 3.6.2003 Annexure-B to this petition, and

(E) further be pleased to direct the respondent authorities to make payment of ad-hoc gratuity against the pension payment order dated 3.6.2003.”

5. A notice was issued to the respondents and an affidavit has been filed on behalf of respondent No.1. There is no dispute on factual development and sequence of events as are reflected in the petition. The case of the respondents is that the petitioner had stopped working with effect from 1st January,1995 and was given a

fresh appointment by order dated 2nd November,1995 and in light of Rule 41 of BCSR, re-employment of Government servant, after resignation or removal or dismissal or after discharge on reduction of establishment or invalidation out of service amounts to a fresh appointment and he will, therefore, draw minimum of the time scale. However, if the case is considered for higher rate of pay scale, then, the case would be governed by Rule 51. The petitioner has not completed 10 years of service and, therefore, he is not entitled to pensionary benefits.

5.1 It also transpires from the affidavit-in-reply that a proposal was made by Superintendent, Community Health Center, Harij to regularize period of absence of petitioner from 1st January,1995 which has been rejected by Secretary, Health and Family Welfare Department after due consideration by communication dated 29th January,2000 and it is contended that in light of Rule 43 of BCSR, this period of absence cannot be regularized.

6. Heard learned Advocate Mr.Upadhyay for the petitioner and learned AGP Mr.Dabhi for the respondents. Both have canvassed their respective cases as per the contentions in the petition and the affidavit-in-reply.

7. It is not in dispute that the petitioner was appointed by the Government of Gujarat as Medical Officer (Class-II) by order dated 3rd June,1983 and, therefore, the Government is the appointing authority of the petitioner, who could have accepted or rejected the resignation. It is also not in dispute that the petitioner's resignation, addressed to the appointing authority, was sent through proper channel i.e. Head of the Department. It is also not in dispute that the Head of the Department never forwarded the resignation to the appointing authority and before the effective date of resignation, he communicated to the petitioner to the effect that his resignation cannot be “recommended” as he is a bonded candidate and that he should resume his duty urgently. This was on 22nd December,1994. It appears that despite this communication, the petitioner abstained from working with effect from 1st January,1995 till 2nd November,1995 and took charge at Harij with effect from 3rd November,1995.

8. The question that arises for determination is, whether the petitioner's functioning after 3rd November,1995 as Medical Officer (Class-II) can be termed as a fresh appointment or not.

9. The respondent authorities claim and appear to have acted on a premise that it is a fresh appointment and on that basis, order Annexure-B has been passed. Be that as it may, for examining the case of the respondents that it is a fresh appointment, the communication dated 2nd November,1995 (Annexure-G) will have to be examined. It is an order passed by Chief Personnel Officer of Health, Medical Services and Medical Education Department, Gandhinagar, passed in pursuance of order of the Commissioner of Health (Head of the Department) dated 18th October,1995. In that order, after referring to the history of appointment and resignation by the petitioner, it is stated that the petitioner has made a request to join as Medical Officer (Class-II) by communication dated 4th September,1995 and that he is posted at Community Health Center,Harij, District – Mehsana as Medical Officer (Class-II).

9.1 It is clear from reading of this order that the order is passed by Chief Personnel Officer upon order of the Head of the Department. Neither of whom is the appointing authority for the petitioner who was Medical Officer (Class-II). It also does not speak of appointing the petitioner but, only speaks of posting him at Harij.

To be sure, this Court inquired from learned Advocate for the petitioner as to what was the application dated 4th September,1995 which finds its reference in the said order. Learned Advocate for the petitioner places on record true copy of the said communication. That communication is addressed by the petitioner to the Head of the Department stating that he had tendered resignation on 1st December,1994 which was not accepted till the date of said communication. He is, therefore, required to join duty and, therefore, he be given posting as Medical Officer (Class-II). It was also requested in the said communication that his period of break may be treated as regularized. Thus, it is clear that communication dated 4th September,1995 was only a request to give posting to the petitioner in light of the fact that his resignation was not accepted.

9.2 What emerges, therefore, is that the resignation of the petitioner was not forwarded to the appointing authority, no recommendation was made and he was informed that his resignation cannot be sent to the appointing authority with recommendation, and that he should join the duty urgently. This happened before the effective date of resignation. Differently put, before the resignation could have become effective, the request for

resignation was refused to be sent to appointing authority for its consideration by H.O.D. Communication dated 4th September,1995, by no stretch of imagination, can be considered to be an application for appointment as Medical Officer (Class-II). There was no advertisement nor was any procedure followed for giving fresh appointment. The order dated 2nd November,1995 also does not speak of a fresh appointment but, it only speaks of posting. The contention in affidavit-in-reply in this regard therefore, cannot be accepted.

9.3 In this context, if the developments as they have taken place uptil now are examined, the petitioner took charge at Harij from 3rd November,1995 and worked as such till he effectively retired on 31st March,2003. His pay was fixed as per his seniority and was accordingly paid. His pension papers have been processed and taking into consideration his length of service etc., order at Annexure-B has been passed on 3rd June,2003 by the Director of Pension and Provident Fund.

9.4 Thus, in their conduct also the respondents' contention about fresh appointment of the petitioner by order dated 2nd November,1995 is not reflected. The contention in affidavit-in-reply is only an afterthought

defence. It is, therefore, not possible to accept the said contention.

10. It is also worth a note that despite repeated requests after order Annexure-B, the respondent authorities have not reacted to the requests nor have they indicated as to why the said order is not acted upon. Requests made by the petitioner for issuance of No Event Certificate as well as No Due Certificate has also been paid no heed to. The affidavit-in-reply is conspicuously silent on this aspect. The case of the petitioner that there are no departmental proceedings against him, has remained uncontroverted. The petitioner was permitted to retire with effect from 31st March,2003 by order Annexure-A dated 28th March,2003 by the Government and it can be legitimately inferred that there was no departmental proceeding pending or contemplated against the petitioner till that date nor it is not the case of the respondents in affidavit-in-reply. Under the circumstances, there appears no reason, except what is stated in the affidavit-in-reply, for the respondent authorities not to act upon order Annexure-B. The stand taken in the affidavit-in-reply appears to be devoid of merits for the reasons discussed herein above. The respondent authorities ought to have acted upon the order

at Annexure-B.

11. The petition, therefore, deserves to be allowed. The respondent No.3 shall take a decision on question of issuance of No Event Certificate and No Due Certificate within a week from date of receipt of a writ of this order. On production of certificates, the respondent Nos.4 and 5 are directed to act upon order at Annexure-B dated 3rd June,2003 within a period of 15 days therefrom. Rule is made absolute. Direct service is permitted. No costs.

(A.L.DAVE,J.)

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